appeal." The debtor instead of taking action as suggested in the judgment of the learned judge, filed a notice of appeal against the order of the High Court to this court.

He appealed only on one ground and it reads as follows: —

"That the service of the bankruptcy notice on the judgment debtor was defective in that the judgment creditor failed to comply with the mandatory provisions of rule 17 of the Bankruptcy Rules 1969 and such non-compliance by the judgment creditor is fatal."

In his argument before us counsel for the debtor informed us that on a search having been made at the Registry of the High Court it was found that a copy of the advertisement in the local paper had not been left by the person inserting it with the registry. That failure according to him, is fatal. He also pointed out to us that under rule 17, the registrar has to make a memorandum of the fact of filing the advertisement with him and that such memorandum shall be *prima facie* evidence that such advertisement had been duly inserted in the said newspaper. That failure to do so in his submission amounts to non-compliance of the mandatory provisions of rule 17 and therefore fatal to the petition.

We had already indicated to counsel for the bankrupt that we could have dismissed the appeal on the ground that the facts upon which he based his argument were not proved. Besides there could have been some explanation coming from the registrar why at the time when counsel alleged that a copy of the advertisement in the local paper was not found in the file of the registrar. We have also indicated that for the purpose of this judgment, we would accept that there has been a failure on the part of the creditor to file a copy of the advertisement. The question therefore we have to consider is whether such failure is fatal to the petition.

The judgment of the Privy Council in the case of *Rengasamy Pillai* v. *Comptroller of Income Tax*[1] was brought to our attention. The question decided by their Lordships in that case was different from the present one but there were certain passages in the judgment which in my view would be of assistance to me. Their Lordships referred to section 147(1) of the English Bankruptcy Act 1914 which corresponds substantially to our old section 131 of the Bankruptcy Ordinance 1959 and also to section 131 of the present Bankruptcy Act 1967.

It reads as follows: —

"No proceeding in bankruptcy shall be invalidated by any formal defect or by an irregularity, unless the court before which an objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court."

In the course of their judgment their Lordships of the Privy Council in the case I referred to said this: —

"But there is relevant authority upon the construction of the identical words in section 147(1) of the English Bankruptcy Act 1914. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a "formal defect or irregularity". It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused."

In my view, the failure to comply with rule 17 is only a formal defect or irregularity. It cannot reasonably be said that the failure to file a copy of the advertisement has effected the service of the bankruptcy notice and the creditor's petition on the debtor.

Suffian and **Ali F.JJ.** concurred.

Appeal dismissed.

Solicitors: *R. Rajasingam & Co.; Jag Jit Singh & Co.*

KUNG AIK v. PUBLIC PROSECUTOR

[O.C.J. (Ong Hock Sim J.) July 3, 1970]

[Penang — Criminal Application No. 8 of 1970]

Constitutional Law — Citizenship — State Nationality Enactment — Citizenship by operation of law — Citizen by operation of law cannot be banished — Banishment Ordinance, 1959, s. 5(1) and (3) — Kedah Nationality Enactment 1371, (1952) — Federal Constitution, arts. 14 and 16.

This was an application to set aside an order of banishment made against the applicant. The applicant was born in Kedah and his mother held a certificate of citizenship of the Federation issued under article 16 of the Federal Constitution. Article 16 of the Federal Constitution entitles any person of or above the age of 18 years who was born in the Federation before *Merdeka Day* to be registered, upon application to the Federal Government, as a citizen, if he satisfies certain conditions set out therein. Under section 4(c) of the Kedah Nationality Enactment, 1371, "a person born before on or after the prescribed date in the State one of whose parents was born in the Federation of Malaya" is a subject of the Ruler by operation of law.

Held: as the applicant was born in Kedah and as it must be taken from the certificate of citizenship given to her that his mother was born in the Federation, the applicant was a citizen of the Federation by operation of law and therefore the order of banishment made against the applicant must be set aside.

Per Ong Hock Sim J.: "Having heard that this applicant was in custody with the shadow of a banishment order over his head since November 1966, (I have also learnt that he willingly granted a divorce to his wife so that she would not be left stranded and unprovided for, as he had entertained little hope of being released), I hope what I say here today will bring to the attention of the authorities dealing with banishment the primary duty to satisfy themselves of, and to make full inquiry into, the status of a person before taking action under the Banishment Ordinance."

CRIMINAL APPLICATION.

Triptipal Singh for the applicant.

Ajaib Singh (Senior Federal Counsel) for the Attorney-General.

Ong Hock Sim J. (delivering oral judgment): An order of banishment was made by the Minister of Home Affairs under section 5(1) of the Banishment Ordinance (No. 11 of 1959) against the applicant, Kung Aik @ Kung Seak Kiang. By the terms of subsection (3) of the same section, the applicant could apply within a period of fourteen days of the service of the banishment order on him to the High Court to set aside such

order. This he failed to do within the requisite period and it is claimed that fresh evidence only came to hand after the expiration of the period provided for the appeal. In the circumstances, upon an application by counsel for the applicant, I exercised the inherent power of the court to extend the time to appeal against the order. Very properly and very fairly, the learned senior federal counsel did not oppose the setting aside of the banishment order. As has been stated, the applicant had been under detention since November, 1966 on a warrant of detention prior to the expiration of a sentence of imprisonment of two years which he had been serving for armed robbery. This was followed, presumably after due inquiry, by the issue of a banishment order.

The mother of the applicant in her affidavit stated she was born in Kedah in 1925 and she holds a certificate of citizenship of the Federation of Malaysia, being citizenship No. 635525, under article 16 of the Federal Constitution. article 16 entitles "any person of or over the age of 18 years who was born in the Federation before Merdeka Day to be registered upon application to the Federal Government as a citizen" if he satisfies certain conditions set out therein. In view of the grant of the certificate to the mother, it must be taken as an accepted fact and conclusive evidence that the mother was born in the Federation and eligible to be registered as a citizen. Article 14 of the Federal Constitution provides that persons who are citizens by operation of law include "every person who, immediately before Merdeka Day, was a citizen of the Federation by virtue of any of the provisions of the Federation of Malaya Agreement 1948, whether by operation of law or otherwise."

The applicant, as stated in the affidavit of his mother, was born on the 10th September, 1942 at Bakar Arang, Sungei Patani in the State of Kedah and a certified extract of an entry relating to his birth was annexed as an exhibit to the affidavit of the applicant himself.

I now turn to the Kedah Nationality Enactment (No. 5 of 1371, equivalent to the year 1952), section 4 of which reads that

"on or after the prescribed date the persons ... shall be subjects of the Ruler by operation of law. They include, vide subsection (c), "any person born before on or after the prescribed date in the State one of whose parents was born in the Federation of Malaya."

Section 2 of Enactment No. 5 of 1371 defines "Federation of Malaya", in respect of any period prior to the first day of February, 1948, to mean any of the territories now comprised in the Federation of Malaya. It would be pertinent now to refer to clause 4 of the Federation of Malaya Agreement which reads:

"4. In pursuance of the Federation agreement there shall be established a Federation, comprising the Malay States and the Settlements, to be known as the Federation of Malaya or, in Malay, "Persekutuan Tanah Melayu", constituted in all respects in accordance with the provisions of that Agreement and this Order."

By virtue of article 14 of the Constitution, which I have read, and the Kedah Nationality Enactment, and the affidavits sworn to by his mother and himself, the applicant has satisfied me that he is a citizen by operation of law. The Banishment Ordinance only applies to persons who are not citizens of the Federation and subsection 5(3) clearly provides that it is within the competence of the court to set aside a banishment order upon proof that the applicant is a citizen of the Federation or an exempted person.

Perhaps it is little understood that various State Nationality Enactments have been passed since the Federation of Malaya came into existence in 1948, a great number of them in the year 1952. These revised nationality laws altered the position with regard to non-Malays who were born in the Malay States prior to 1948 (the position of those born in the Settlements being somewhat different). A person born in a Malay State before 1948 was a British protected person and the Rulers of the State could not then have non-Malays or non-Muslims as subjects of the Ruler. Since the formation of the Federation of Malaya in 1948, and finally, the achievement of Merdeka in 1957, the Rulers have come to adopt an enlightened attitude and decided to be more liberal and accord a certain degree of recognition and rights to persons born within their State.

Having heard that this applicant was in custody, with the shadow of a banishment order over his head since November 1966, (I have also learnt that he willingly granted a divorce to his wife so that she would not be left stranded and unprovided for, as he had entertained little hope of being released), I hope what I say here today will bring to the attention of the authorities dealing with banishment the primary duty to satisfy themselves of, and to make full inquiry into, the status of a person before taking action under the Banishment Ordinance. As I hold that the applicant is a citizen by operation of law, I set aside the order of banishment made by the Minister. The applicant is at liberty to leave the court forthwith.

Banishment order set aside.

Solicitors: *Triptipal Singh & Co.*

CHEONG KHEAN SHENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) July 9, 1967]

[Kuala Lumpur — Criminal Appeal No. 32 of 1970]

Penal Code, ss. 465 & 471 — Dishonestly using as genuine a forged Singapore identity card in order to exchange it for a Federation identity card.

Criminal Law and Procedure — Appeal — Duty of appellate court — Question of credibility of witnesses.

The appellant claimed to be the holder of a Singapore identity card. He applied to the registration officer for an exchange of his Singapore identity card. He was interviewed and he presented his Singapore identity card to the registration officer as evidence. That card was later verified from the Singapore registration office to be a forgery. He was charged with dishonestly using as genuine the Singapore identity card in order to exchange it for a Federation identity card and that he knew or had reason to believe it to be forged. He